APPEAL NO. 030238
FILED MARCH 13, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 17, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, November 23, 2001, through February 21, 2002, and is entitled to SIBs for the sixth quarter, August 24 through November 22, 2002. The appellant self-insured (carrier) appealed, arguing that the claimant's inability to work is not directly related to her compensable injury and that the claimant has not made a good faith effort to obtain employment commensurate with her ability to work. The carrier argues that the doctor's records contain only conclusory statements and that the hearing officer erred in excluding the investigative report from admission into evidence at the CCH. The claimant responded, urging affirmance and maintaining that the investigative report was properly excluded by proper objection.

DECISION

Affirmed.

The carrier asserts that the hearing officer erred in excluding an investigative report. The claimant objected to its admission at the CCH on the grounds that the document and tape had not been timely exchanged. Parties must exchange documentary evidence with each other not later than 15 days after the benefit review conference and thereafter, as it becomes available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The carrier attached an "exhibit list letter" and the corresponding certified mail card to its appeal, arguing that the report was timely exchanged. At the CCH, the claimant's attorney denied receipt of the investigative report prior to the date of the CCH. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). It was a factual issue for the hearing officer to determine whether or not the excluded document was in fact timely exchanged, and if not if there was good cause for such failure. We do not find the hearing officer's ruling to be an abuse of discretion, nor can we say that the

hearing officer acted without reference to guiding rules and principles. Nor did the carrier establish that the evidentiary error it asserts probably caused the rendition of an improper judgment.

Section 408.142(a) and Rule 130.102 set out the statutory and administrative rule requirements for SIBs. The parties stipulated that the qualifying period for the third quarter began August 11 and ended November 9, 2001. The parties also stipulated that the qualifying period for the sixth quarter began May 11 and ended August 9, 2002.

The carrier asserts that the claimant's underemployment during the qualifying period was not a direct result of her impairment. We have noted that a finding that the claimant's unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence if the injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. In this instance, there is evidence from which the hearing officer could determine that the claimant's injury resulted in permanent impairment and that, as a result thereof, the claimant could no longer reasonably work as a nurse practitioner.

The carrier also asserts that the claimant's employment was not commensurate with her ability to work during the qualifying period for the third and sixth quarters, and that she did not make a good faith effort to obtain employment commensurate with her ability to work. The question of whether the claimant returned to work in a position relatively equal to her ability to work is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 011787, decided September 21, 2001. The Appeals Panel has specifically rejected the argument that a claimant must work in the relatively equal position during each week of the qualifying period in order to satisfy the good faith requirement of Rule 130.102(d)(1). Texas Workers' Compensation Commission Appeal No. 011519, decided August 16, 2001.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence, including the medical evidence, and determines what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the medical evidence from the claimant's treating doctor, the hearing officer could determine that the claimant's job was relatively equal to her ability to work during the qualifying period for the third and sixth quarters. The hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination, or the determination that the claimant is entitled to SIBs for the third and sixth quarters, on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Roy L. Warren
Appeals Judge